WHAT IS IT ABOUT SAYING WE'RE SORRY?[1] NEW FEDERAL LEGISLATION AND THE FORGOTTEN PROMISES OF THE TREATY OF GUADALUPE HIDALGO

JON MICHAEL HAYNES†

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† St. Mary's University School of Law, Candidate for J.D., May 2002; The University of Texas at San Antonio, B.A. English Literature, May 1998.

1. This title is taken from a San Antonio Express News article by Cary Clack on the issue of reparations for minorities in the United States, specifically Native Americans and African Americans. *See* Cary Clack, *What is it About Saying We're Sorry?*, SAN ANTONIO EXPRESS-NEWS, Sept. 11, 2000, at 1B. By borrowing this title from Mr. Clack I in no way intend to equate the plight of Native and African Americans to the injustice imparted on Mexican Americans due to the United States' failure to adhere to the spirit of the Treaty of Guadalupe Hidalgo. I only use it for its effective conveyance of the general attitude of denial that surrounds issues of injustices suffered by minorities in the United States.

I. INTRODUCTION

Recently in Texas, Mexican-American families have begun to fight for the return of their ancestral lands, lands taken from them throughout decades of injustice at the hands of predominantly Anglo courts.[2] In fact, the entire Southwest has seen a slow but steady rise in the number of active voices calling for accountability and compensation for the theft of land formerly granted under Spanish and Mexican rule.[3] Only a handful of these claims have resulted in successful outcomes for Mexican Americans; and of these, none were based on the seemingly forgotten promises of the Treaty of Guadalupe Hidalgo[4] (the Treaty).

The Treaty of Guadalupe Hidalgo was ratified in 1848, ending the war between Mexico and the United States and effectively handing over control of the modern Southwest from Mexico to the United States. Under the terms of the Treaty, Mexican property holders were to retain full enjoyment and protection of their property as if they were citizens of the United States. Furthermore, where there existed any doubt as to whether property was validly owned or not, the laws under which these grants of land were made were to control. Thus, where there was an issue concerning the title to real property, Spanish or Mexican title should have been sufficient to prove ownership according to the terms of the Treaty. However, as claims began to arise citing the protection of the Treaty, the United States government and judiciary continually managed to deny these claims through a combination of legislation and judicial decisions.

Due to the Treaty's unenforceability and an historic inability to adjudicate claims in American courts under other existing legal doctrines,[5]

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2. *See, e.g.*, James Pinkerton, *Padre Isle Heirs Win Judgment; Jury: Lawyer Took Oil and Gas Profits*, HOUS. CHRON., Aug. 3, 2000, at A1; Jeremy Schwartz, *As Ballis Fight Kenedy and King Ranches, Attention Turns to the 365 Claims Still Mired in the History of South Texas Homelands: Ballis' Win May Inspire Other Land Struggles*, CORPUS CHRISTI CALLER-TIMES, Aug. 13, 2000, at A1; Sam Howe Verhovek, *Cattle Barons of Texas Yore Accused of Epic Land Grab*, N.Y. TIMES, July 14, 1997, at A1.

3. *See, e.g.*, Barbara Ferry, *Land-Grant Claims Still Unanswered*, SANTA FE NEW MEXICAN, Aug. 28, 1999, at A1 (concerning land grant claims in New Mexico stemming from federal acquisition of land for the Manhattan Project); Lalo Lopez, *Legacy of a Land Grab*, HISPANIC MAGAZINE, Sept. 1997 (concerning land grant claims throughout the Southwest based on the promises of the Treaty of Guadalupe Hidalgo); Becky Rumsey, *A Lost Land Grant: Can it be Reclaimed?*, HIGH COUNTRY NEWS, Oct. 18, 1993, Vol. 25 No. 19 (concerning land grant claims in Colorado).

4. *See* Treaty of Peace, Friendship, Limits, and Settlement, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922.

5. *See, e.g.*, Baker v. Harvey, 181 U.S. 481 (1901) (holding that grants not presented to and confirmed by California land commissioners within the statutory period were void); Ainsa v. N. M. & Ariz. R.R., 175 U.S. 76 (1899) (holding that the Court of Private Land Claims retains jurisdiction to determine the validity of Spanish and Mexican land grants); Cessna v. United States, 169 U.S. 165 (1898) (holding that the omission of the tenth article

those bringing land-related claims under the Treaty have recently turned their attention to the federal legislature.[6] To date, there have been only a small number of bills introduced in Congress that examine the validity of these claims and propose some form of restitution to dispossessed landowners and their descendants.[7] In 1997, House Resolution 2538 sought to create a presidential commission to determine the validity of these claims.[8] Additionally, a bill introduced before the Senate in 1998 proposed to acknowledge these property claims outright and to develop a method to compensate the dispossessed families.[9] Neither of these potential measures ascended beyond bill status. Nevertheless, their existence evidences a measure of hope for dispossessed landowners and their descendants as it demonstrates an increasing acknowledgement of the history of these lands by the United States government. Such proposed legislation also signifies the overdue recognition that citizens of the United States have been denied rights guaranteed to them for a period exceeding 150 years. Finally, in 2000, Senate Bill 2022 was introduced in the 106th Congress.[10] In drafting the proposed legislation, Congress

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from the Treaty prevents imperfect Mexican and Spanish land grants from being recognized by United States courts); Cal. Powerworks v. Davis, 151 U.S. 389 (1894) (holding that the California Land Act supercedes rights guaranteed by the Treaty); Botiller v. Dominguez, 130 U.S. 238 (1889) (holding that courts may not enforce provisions of Treaty over contradictory acts of Congress); Interstate Land Co. v. Maxwell Land Co., 139 U.S. 569 (1891) (holding that a party attempting to prove title by Mexican Grant must instead prove strength of title under American law); McKinney v. Saviego, 59 U.S. 235 (1856) (holding that Texas is not included in the lands protected by the Treaty for Mexican non-residents). *See also* RICHARD GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT 87 (1990). The author asserts that "[a]lthough some Indians and Hispanics lodged lawsuits citing [T]reaty guarantees, the vast majority of them were unsuccessful in their efforts." *Id.* In addition, American land companies and various state and government entities were the primary beneficiaries of the courts' reluctance to enforce the Treaty. *See id.* This interpretation is not completely anomalous to United States courts' general philosophical and political slant of the times however. *See id.* at 87-89. For a summary of how this era in American jurisprudence is emblematic of American courts' general trend of denying rights to disenfranchised groups of American society in favor of business and governmental needs, see *id.* at 87-107.

6. *See, e.g.*, H.R. 2538, 105th Cong. § 3 (1997); S. 2503, 105th Cong. § 3 (1998); S. 2155, 105th Cong. § 3 (1998) (pertaining to bills introduced in the House and the Senate that would have established a Presidential Commission to analyze the validity of land grant claims created by the Treaty of Guadalupe Hidalgo, to acknowledge the property claims of land grant families, and to provide restitution); *see also* Patrick Armijo, *Udall Stands by Track Record*, ALBUQUERQUE J., May 28, 2000, at B1 (referring to the history of the legislation and its support from Representative Tom Udall, D-N.M.).

7. *See* H.R. 2538; S. 2503; S. 2155.

8. *See* H.R. 2538, at §§ 3-4.

9. *See* S. 2503; S. 2155.

10. *See* S. 2022, 106th Cong. (2000). The bill is short titled as a bill "[t]o provide for the development of remedies to resolve unmet community land grant claims in New Mex-

made findings[11] which recognized that the loss of property subsequent to the war with Mexico has had serious repercussions in the Mexican-American community in the southwest United States.[12] In addition, the proposed legislation specifically questioned whether the United States fulfilled its obligations under the Treaty.[13] Congress acknowledged that actions taken by the federal government as well as the Territory of New Mexico in the mid to late nineteenth century were central to the dispossession of Mexican American landholders.[14] The findings also indicated a disparity in the outcomes of land grant adjudications in New Mexico when compared to California.[15] Although not directly placing blame, the legislation questioned whether adjudications in New Mexico were fairly and equitably administered.[16] Instead of squarely addressing the issue, however, the bill concludes with a nebulous promise to remedy any "lingering injustice" from the failure of the United States to meet its obligations under the Treaty.[17] The legislation provides that alternative methods will be prepared and the President shall then submit to Congress recommendations to resolve these claims within six months of the submission of the GAO[18] report.[19] The notable caveat is added that "[i]n no

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ico." *Id.* The purpose of the proposed legislation is "to provide for the development of potential remedies to resolve unmet obligations by the United States with regard to community land grant claims in New Mexico under the Treaty of Guadalupe Hidalgo." *Id.* § 2(a). The legislation defines community land grants as comprised of "a village, town, settlement, or pueblo consisting of land held in common (accompanied by lesser private allotments) by three or more families under a grant from the King of Spain (or his representative) before the effective date of the Treaty of Cordova, August 24, 1821, or from the authorities of the Republic of Mexico before May 30, 1848, in what became the state of New Mexico, regardless of the original character of the grant." *Id.* § 2(b)(2).

11. *See id.*

12. *See id.* § 2(c)(5). The proposed legislation states:

> [f]ollowing the United States war with Mexico and for much of this century, the economy of New Mexico was dependent on land resources. When the land grant claimants lost title to their land, the predominantly Hispanic communities in New Mexico lost a keystone to their economy, and the effects of this loss had long lasting economic consequences for these communities.

Id.

13. *See id.* § 2(c)(3).

14. *See id.*

15. *See id.* § 2(c)(4) (noting that the State of California confirmed approximately 73 percent of land deriving from Mexican or Spanish grants, while New Mexico confirmed only 24 percent of acreage claimed through these grants). *See generally* Placido Gomez, *The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants*, 25 NAT. RESOURCES J. 1039 (1985) (analyzing the adjudication of Spanish and Mexican land grants in New Mexico).

16. *See* S. 2022 § 2(c)(4).

17. *See id.* § 3.

18. GAO stands for the United States General Accounting Office. *See id.* § 2(b)(4).

event shall these recommendations include the divestiture of private property rights."[20]

While the proposed legislation represents a long overdue acknowledgement of the problem, it does not sufficiently address the root of that problem. The proposed legislation fails to mention the United States' blatant failure to adhere to the provisions of the Treaty and only touches on the long history of social and economic oppression that Mexican Americans have suffered as a result.[21] In addition, it is significant to note that Mexican Americans are the only minority group in the United States, other than Native Americans, to be annexed by conquest and to have their rights allegedly safeguarded by treaty.[22] Therefore, while this overdue progress is necessary, there remains the issue of accountability on the part of the federal government. It is vital that an official apology be issued to those wrongfully and illegally dispossessed of their property. Without this public apology, no measure for righting the wrongs of the past can be considered complete.[23]

A general survey of this era in American history reveals one constant: the United States, through an unwritten policy of territorial expansionism via political and judicial avenues, has denied Mexican Americans their Constitutional rights both as landowners and as citizens in general.[24] In addition, the history of the Treaty and the United States' subsequent fail-

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19. *See id.* § 3.

20. *Id.*

21. *See id.* § 2(c)(5). For a general assessment of these deep-rooted cultural and sociological barriers, see RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS (3d ed. 1988) and ARNOLDO DE LEON, THEY CALLED THEM GREASERS (1983).

22. *See* CAREY MCWILLIAMS, NORTH FROM MEXICO: THE SPANISH-SPEAKING PEOPLE OF THE UNITED STATES 101-02 (New ed., updated by Matt S. Meier, Praeger Publishers 1990). The war against Mexico not only increased the territory of the United States but the population as well. *See id.* at 101. McWilliams notes that as late as 1943 some Mexican schools still designated the former Mexican Northwest as the "territory temporarily in the hands of the United States." *Id.*

23. For a discussion of the need for openness and accountability as a prerequisite to genuine efforts to compensate for past loss and the resultant persistent lack of equal opportunity in the context of African Americans, see Art Alcausin Hall, *There is a Lot to be Repaired Before We Get to Reparations: A Critique of the Underlying Issues of Race That Impact the Fate of African American Reparations*, 2 SCHOLAR 1 (2000). Professor Hall also addresses reparations for Native Americans, Japanese Americans, as well as German reparations to Holocaust victims. *See id.*

24. *See generally* ACUÑA, *supra* note 21; MCWILLIAMS, *supra* note 22, at 97-100; RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A HISTORY OF THE AMERICAN WEST 77-83 (1991).

ure to adhere to the Treaty's spirit and intent reveals a microcosm of race relations throughout United States history.[25]

This comment illustrates one chapter of this history; a history of accumulated injustices premised upon racist notions and fueled by self-serving political and judicial institutions. In doing so, this comment demonstrates the United States government's culpability for the dispossession of Mexican-American landholders. More specifically, this comment focuses on the federal government's and judiciary's actions subsequent to ratification of the Treaty and the 153 years of inequality under the law that have followed. By tracing the political and legal history of the Southwest, this comment makes evident the underlying force behind this era of injustice—United States economic policy. This comment specifically illustrates the United States' desire to acquire and control land.[26] The war, Treaty, federal legislation, and judicial opinions that followed have all resulted in the dispossession of Mexican-American landholders and the simultaneous enrichment of White America. A survey of the relevant historical, political, and judicial actions during the middle to late nineteenth century demonstrates that the acquisition and control of land was the primary factor behind the disenfranchisement of Mexican Americans at the precise moment that they became a substantial component of the population of the United States.[27]

II. BACKGROUND OF EVENTS LEADING TO WAR WITH MEXICO

A. *A Brief History of Land Grants in the Southwest*

To understand the nature of Spanish and Mexican land grants and the problems they have created, it is necessary to comprehend the divergent nature of property rights existing between nineteenth century Mexico and

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25. The United States has a long history of denying rights to Native Americans, even where these rights are allegedly safeguarded by treaty. *See generally* ALVIN M. JOSEPHY, JR, 500 NATIONS: AN ILLUSTRATED HISTORY OF NORTH AMERICAN INDIANS (1994); WHITE, *supra* note 24.

26. For a summary of American expansionist policy that led to the acquisition of the western/southwestern United States, see WHITE, *supra* note 24, at 61-84. White chronicles the primary events and policies that shaped the modern day American West. *See id.* This account includes the Louisiana Purchase, the acquisitions of Texas and Oregon, the policy of Manifest Destiny as furthered by expansionist Presidents James K. Polk and John Tyler, the Mexican-American War, wars of acquisition in the far West, and the Gasden Purchase. *See id.*

27. *See* MCWILLIAMS, *supra* note 22, at 57. There were approximately 75,000 Spanish-speaking people living in the Southwest at the time of the ratification of the Treaty. *See id.* Of these, perhaps no more that 2,000 Mexican citizens in the territories annexed by the United States pursuant to the Mexican-American War relocated to territory retained by Mexico. *See id.*

the United States.[28] In the former Spanish and Mexican territories that are now the American Southwest, title to land derived from grants made by either the Spanish government or the various governments of Mexico.[29] These governments issued grants to individuals, communities, and groups of settlers[30] to secure land both against Native American aggression and the colonization attempts of other nations.[31] Additionally, grants were frequently issued to reward soldiers for their military service.[32]

With the ratification of the Treaty, and particularly the approval of Article VIII of the Treaty, United States courts undertook the task of finding common ground between two fundamentally divergent philosophies concerning property ownership.[33] On the one hand, the United States guarded the Anglo American concept of freely alienable, individually owned property rights.[34] On the other hand, it was faced with the long-standing philosophy of a land-dependent culture that viewed common land ownership as essential to societal success.[35] This philosophical difference sheds some light on Mexico's insistence on the specific protection of certain property rights in the Treaty and on the United States' ultimate refusal to grant these protections. The history since the ratification of the

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28. For a general discussion on the philosophical differences separating Anglo and Hispanic property concepts as they apply to the adjudication of Spanish and Mexican land grants, see G. Emlen Hall, *Land Litigation and the Idea of New Mexico Progress*, *in* SPANISH AND MEXICAN LAND GRANTS AND THE LAW 48-58 (Malcolm Ebright ed., 1989). Hall notes that the frequent changes of sovereigns in the Southwest and their varying approaches to real property law have created a long history of inherent difficulties in resolving land disputes. *See id.* at 48. *See generally* Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 210 (1996) (noting that "[t]he problem of distinguishing private Mexican property rights from the new addition to the United States public domain was exacerbated by the two nations' widely divergent perceptions of property rights."); DONALD E. CHIPMAN, SPANISH TEXAS, 1519-1821 (1992) (examining Spanish influence and policies in the Texas region).

29. *See* Klein, *supra* note 28. *See generally* WHITE, *supra* note 25, at 17-18, 37, 42, 64-65, 237-41 (exploring the various factors involved in Southwest land grants).

30. *See* Klein, *supra* note 28 (noting that Spanish and Mexican land grants were made to a wide variety of grantees). *See also* Charles L. Briggs & John R. Van Ness, *Introduction*, *in* LAND, WATER, AND CULTURE: NEW PERSPECTIVES ON HISPANIC LAND GRANTS 3, 4-9 (New Mexico Land Grant Series, Charles L. Briggs & John R. Van Ness eds., 1987); Malcolm Ebright, *New Mexican Land Grants: The Legal Background*, *in* LAND, WATER, AND CULTURE: NEW PERSPECTIVES ON HISPANIC LAND GRANTS 15, 19, 21-24 (New Mexico Land Grant Series, Charles L. Briggs & John R. Van Ness eds., 1987).

31. *See* Klein, *supra* note 28 (citing Briggs & Van Ness, *supra* note 30, at 4-9).

32. *See id.*

33. *See id.*

34. *See* Hall, *supra* note 28.

35. *See* Klein, *supra* note 28.

Treaty has illustrated that the United States' interpretation of the Treaty of Guadalupe Hidalgo has disfavored original Mexican grantees in favor of their Anglo counterparts.[36] The foundation of this policy is rooted in nineteenth century American expansionist policies. An overview of this era in American history reveals not only America's general approach to territorial expansion, but also the rationale behind its denial of private property rights.

B. *Manifest Destiny*

Pobre Mexico, tan lejos de Dios y tan cerca de Los Estados Unidos.[37]

In hindsight, it is easy to recognize the territorial expansion of the United States as the primary, and perhaps only benefit of the war with Mexico. The end of the war and the resulting Treaty depleted Mexican national territory by one-half, while it expanded United States territory by one-third.[38] The territory lost by Mexico and gained by the United States now comprises the current states of California, New Mexico, Colorado, Arizona, Utah, Nevada, Wyoming, Kansas, Oklahoma, and Texas.[39] This thirst for territorial expansion is characterized by the term Manifest Destiny.[40] Both the war against Mexico and the subsequent signing of the Treaty were consequences of this nineteenth century expansionist policy.[41]

Manifest Destiny served to justify Anglo expansion into territories held by those of Mexican, Spanish and Native American descent.[42] The

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36. *See* sources cited *supra* note 5.

37. Translated as: Poor Mexico, so far from God and so close to the United States. ALAN RIDING, DISTANT NEIGHBORS: A PORTRAIT OF THE MEXICANS 462 (1985) (noting that the expression is generally attributable to Mexican President Porfirio Diaz).

38. *See* GRISWOLD DEL CASTILLO, *supra* note 5, at 9, Map 1; *see also* Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1616, 1625 (2000).

39. *See* GRISWOLD DEL CASTILLO, *supra* note 5, at 9, Map 1; *see also* Tsosie, *supra* note 38, at 1616.

40. "Manifest Destiny," coined by John O'Sullivan, an editor with the *Democratic Review*, represents the "American 'destiny to overspread the whole North American Continent.'" GRISWOLD DEL CASTILLO, *supra* note 5, at 4. For a more detailed analysis of the effects of Manifest Destiny on American policy, see ALBERT K. WEINBERG, MANIFEST DESTINY: A STUDY OF NATIONALIST EXPANSIONISM IN AMERICAN HISTORY (1935); FREDERICK MERK, MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY: A REINTERPRETATION (1963).

41. *See* Richard Griswold del Castillo, *Manifest Destiny: The Mexican-American War and the Treaty of Guadalupe Hidalgo*, 5 SW. J. L. & TRADE AM. 31, 32 (1998).

42. *See* GRISWOLD DEL CASTILLO, *supra* note 5, at 4-5; Griswold del Castillo, *supra* note 41. In order to be fully appreciated and understood, Manifest Destiny must be viewed against the economic, social, and political backdrop of the United States during the

United States government founded the policy on the strong belief that it was "God's will" for the Anglo race and its accompanying ideals to be spread across the continent, regardless of any natural, cultural, or ideological barriers.[43] Due to this fervently held belief, the immense expanse of land west of the Mississippi River was destined to come under Anglo American control.[44]

Following this ideology, the United States originally sought to acquire the Northwest Territories of Mexico in the same manner as lands purchased from Spain and France.[45] However, due to vastly different political circumstances, coupled with Mexico's unwillingness to concede fifty percent of its territory, the United States chose to utilize warfare and annexation to acquire the present day American Southwest.[46]

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mid to late nineteenth century. *See* Christopher David Ruiz Cameron, *'Friends' or 'Enemies?' The Status of Mexicans and Mexican-Americans in the United States on the Sesquicentennial of the Treaty of Guadalupe Hidalgo*, 5 SW. J. L. & TRADE AM. 5 (1998). The 1840s for the United States was a time of great economic prosperity. *See id.* at 9. In part due to this immense potential, the federal government of the United States promulgated the Monroe Doctrine. *See id.* The Monroe Doctrine embodied Manifest Destiny and had a tremendous effect on American expansionist policy. *See id.* The Doctrine issued a warning to European powers to stay out of the Americas. *See id.* It also authorized the forcible removal of Native Americans from resource-rich territories, thereby clearing the path for Anglo settlement and use. *See id.* Lastly, the United States purchased great expanses of land from France and Spain, including the territory compromising the Louisiana Purchase. *See id.*

43. *See* GRISWOLD DEL CASTILLO, *supra* note 5, at 4; *see also* Griswold del Castillo, *supra* note 41, at 31-32.

44. *See* GRISWOLD DEL CASTILLO, *supra* note 5, at 4. *See also* Griswold del Castillo, *supra* note 41, at 31-32. The national sentiment behind Manifest Destiny enjoyed popularity across social, economic, and political classes. *Id.* While espoused by prominent politicians such as John Quincy Adams and Andrew Jackson, the concept enjoyed additional support from such well thought of intellectuals and philosophers as Walt Whitman and Ralph Waldo Emerson. *Id.* at 32. This widespread support for America's territorial expansion eventually led to the near-unanimous declaration of war by Congress against Mexico in May of 1846. *Id.*

45. *See* Ruiz Cameron, *supra* note 42, at 9.

46. *See id.* at 9-10. For a history of the limited opposition to the war, see Griswold del Castillo, *supra* note 41, at 32. While there is controversy surrounding the extent of President Polk's role in the Mexican-American War, it is clear that he played an important part in bringing an end to the conflict. *See id.* at 33. Polk sent an official peace commissioner to meet with the army occupying Mexico, but later recalled him when the Mexican government seemed insincere in the negotiations. *See id.* at 33. In addition, the President pushed for ratification of the final version of the Treaty despite the fact that it had been brokered by Nicholas Trist, who acted on behalf of the United States without the requisite legal authority. *See id.* at 33, 35. In addition, while the support for American expansion and the subsequent war with Mexico was great, it did not come without some limited opposition. *See id.* at 32. Led primarily by both Northern and Southern members of the Whig party, opposition to the war lay primarily in the view that the war and its focus on the newly annexed territory of Texas was in actuality merely a ploy to strengthen the slave-owning

C. *Land in Texas*

A key factor in the cause of the war, as well as a point of contention in the negotiation of the Treaty, was the annexation of Texas by the United States.[47] When Texas was annexed by the United States in 1845, there already existed a long-standing dispute between Mexico and the Republic of Texas concerning Texas' southwestern border.[48] Texas' addition to the Union aggravated the issue and would serve as a precipitating factor of the Mexican-American War.[49]

For nine years after Texan independence from Mexico in 1836, the new Republic maintained that its territory extended south to the Rio Grande River and far enough north and west to include the eastern-most portions of New Mexico and Colorado.[50] Mexico, however, claimed that the international boundary was the Nueces River north to the Red River.[51] This continuing dispute concerning the border between Mexico and Texas (and later the United States) had its origins in colonial rivalries between Spain and Britain.[52]

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class. *See id.* Other anti-war sentiments similarly found their foundations in the practice of slavery in the United States. *See id.* Some feared that the addition of new territory would inevitably fuel the fire already beginning to burn brightly over the issue of slavery in the nation. *See id.* In addition, some of those who fervently supported the institution of slavery feared that the addition of a substantial non-white, non-slave element to the country's population would have the detrimental effect of fostering notions of freedom in the slave population. *See id.* While the opposition to the war was slight, it did grow throughout the conflict and eventually mustered enough strength to place some indicia of pressure on President James K. Polk to end the war when he did, rather than furthering the campaign to the Southern-most reaches of Mexico. *See id.* at 32-33. The unstable nature of Mexican politics of the time also made settlement of border disputes increasingly unlikely and therefore war more appealing to the United States government. *See id.; see also* GRISWOLD DEL CASTILLO, *supra* note 5, at 15-22.

47. *See* GRISWOLD DEL CASTILLO, *supra* note 5, at 8; MCWILLIAMS, *supra* note 22, at 97-100; *see also* Griswold del Castillo, *supra* note 41, at 34.

48. *See* GRISWOLD DEL CASTILLO, *supra* note 5, at 8; *see also* Griswold del Castillo, *supra* note 41, at 34.

49. *See* GRISWOLD DEL CASTILLO, *supra* note 5, at 8; *see also* Griswold del Castillo, *supra* note 41, at 34.

50. *See* GRISWOLD DEL CASTILLO, *supra* note 5, at 9, Map 1; *see also* Griswold del Castillo, *supra* note 41, at 34.

51. *See* GRISWOLD DEL CASTILLO, *supra* note 5, at 9, Map 1, 10; *see also* Griswold del Castillo, *supra* note 41, at 34.

52. *See* GRISWOLD DEL CASTILLO, *supra* note 5, at 9. When the Spanish ceded the Louisiana Territory to the French in 1800 and the French in turn sold the territory to the United States in 1803, the changes in ownership resulted in a blurring of the exact boundaries of the territory. *Id.* In order to resolve the confusion, the Adams-Onis Treaty was negotiated in 1819 between Spain and the United States. *Id.* As part of the Treaty, Spain gave the United States possession of the Floridas in return for a recognized boundary between Texas and Louisiana as well as monetary compensation. *Id.* Due to Mexico's vari-

Even after the subsequent annexation of Texas by the United States in 1845, the boundaries of the region remained a point of contention between the United States and Mexico.[53] Following an unsuccessful series of attempts by the United States to have the Rio Grande recognized as the southern Boundary of Texas, President James K. Polk ordered General Zachary Taylor to advance south to seize the territory for the United States.[54] Thus, in 1846, when a band of Mexican soldiers took ground on the north banks of the Rio Grande, the United States took advantage of the opportunity to declare that Mexico had initiated an unlawful invasion.[55] Soon after, skirmishes erupted between the United States and Mexican forces which laid the foundation for all-out war and the continued expansion of the United States.[56]

Based upon national expansionist aims and the need to settle the lingering border dispute in Texas, the United States declared war on Mexico on May 13, 1846.[57] By the conclusion of the war, the United States had acquired more than 529,000 square miles of territory through the payment of $15 million and the ratification of what has been labeled by at least one commentator as one of the harshest treaties ever ratified in modern history.[58] It is increasingly accepted in academic circles that the precipitating factor behind the United States' war with Mexico was the acquisition and control of land, although the majority of scholarship continues to overlook this factor as well as the ongoing importance of the Treaty itself.[59]

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ous wars of independence, the Treaty was not recognized in Mexico until 1831, a mere five years before the Texan rebellion. *Id.* This fact was not lost on proponents of Manifest Destiny, who pointed to Mexico's reluctance to ratify the treaty as invalidating any legitimate Mexican claims to Texas. *Id.* Subsequent to the war with Mexico, Manifest Destiny supporters believed and asserted that the annexation of Texas in 1845 brought with it the territory given to Mexico in 1831 via the Treaty of Limits, the first treaty signed between the United States and Mexico. *Id.* at 11.

53. *Id.* at 10.

54. *Id.* at 14.

55. *Id.* at 10. The notion that the Rio Grande represented the southern-most boundary of Texas, and subsequently the United States, had its roots in the beliefs of expansion-minded presidents such as Thomas Jefferson, James Madison, James Monroe, John Quincy Adams, and Andrew Jackson. *Id.* at 11. These men based their views on a French claim to Texas following the eighteenth century boundary disputes with Spain. *Id.*

56. *Id.* at 11.

57. *See* Klein, *supra* note 28, at 208.

58. *See* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 4 (stating the terms of the 15 million dollar purchase); *see also* Ebright, *supra* note 30, at 28 (stating that the Treaty of Guadalupe Hidalgo was forced upon Mexico and not legitimately negotiated); HUBERT HOWE BANCROFT, HISTORY OF MEXICO, 1824-1861 (1885) (referring to the Treaty as "nothing better than barefaced robbery").

59. *See, e.g.*, MANUEL G. GONZALES, MEXICANOS: A HISTORY OF MEXICANS IN THE UNITED STATES 75-81 (1999); WHITE, *supra* note 24, at 77-79. For a survey of the varying

Nineteenth century America's mandate for expanding its territorial limits sheds significant light on the judicial and legislative actions that followed the ratification of the Treaty. When examined in this light, it is apparent that holders of Mexican and Spanish land grants have been denied full protection of American law through legislative and judicial action that has negated the rights guaranteed by the Treaty in favor of American economic expansionist policy. Clearly, the United States has not only a duty but also an obligation to offer an official apology for its wrongdoing to those who were forced to sacrifice their private rights for the perceived "good" of the nation.

III. INTERNATIONAL LAW AND TREATY RIGHTS

A. *International Law*

Before discussing the Treaty of Guadalupe Hidalgo and its unfulfilled conveyances, it is important to address the norms of international law that existed at the time of the Mexican-American War. Although the promises of the Treaty, taken at face value, comport with the tenets of international law, the United States' subsequent modifications of the Treaty violate long-standing norms of private property rights following wars of conquest.[60] Specifically, the practice of international law mandated that the laws of the "conquered" nation, that is, the laws of Spain and Mexico for grants made prior to the ratification of the Treaty, would control rather than the laws of the conquering nation.[61] The United States Supreme Court articulated this legal norm in *United States v. Percheman*.[62]

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viewpoints concerning the Treaty of Guadalupe Hidalgo by both Mexican and United States authors, see GRISWOLD DEL CASTILLO, *supra* note 5, at 108-130.

60. In general, international law subsequent to a state of warfare is limited to personal property and does not typically concern itself with real estate. *See* United States v. Title Ins. & Trust Co., 265 U.S. 472 (1924). Under tenets of international law, when territory passes from one sovereign to another, the citizens' right to their private property is not to be affected. *See* Panama R.R. Co. v. Bosse, 249 U.S. 41 (1919). In addition, grants that had been rightfully made by the former sovereign before annexation are usually not disturbed. *See* Miller v. Letzerich, 49 S.W.2d 404 (1932). This is part of the theory that allegiance of the citizens of the conquered nation is to be transferred to the conquering government without any molestation of private property rights. *See* O'Reilly De Camara v. Brooke, 209 U.S. 45 (1908). In addition, the Supreme Court had ruled before ratification of the Treaty that the principles of international law mandate that private property rights are to be respected in territories annexed by a conquering nation. *See* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

61. *See* Ruiz Cameron, *supra* note 42, at 9.

62. 32 U.S. (7 Pet.) 51 (1833).

In *Percheman*, the Court stated that changes in sovereignty do not adversely affect the property rights in the conquered territories.[63] Instead, Justice Marshall noted that:

> [t]he modern usage of nations, which has become law, would be violated; that sense of justice and of right, which is acknowledged and felt by the whole civilized world, would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved: but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable session of territory?[64]

The Court's mandate of international law in *Percheman* is consistent with the practice of European colonial nations. These nations have promulgated longstanding legal traditions of respecting property rights of citizens in newly acquired territories, pending the assimilation of these peoples and their property into the conquering nation.[65]

Viewing this discussion through the reasoning of *Percheman*, it is apparent that the history of the Treaty has unfolded in a manner inconsistent with the long-established norm of the law of conquest. In addition, the Treaty has unfolded in a manner contrary to the general spirit and intent of the document. It is this continual deviation from legal and historical norms that demonstrates the outright denial of legal protection to Mexican Americans in the name of territorial expansion in the United States. While past inequities may not be easily corrected, there remains a duty on the part of the United States government to admit to this broad deviation from the legal norms and protections owed to its citizenry.

B. *Treaty Rights (The Treaty of Guadalupe Hidalgo as Non Self-Executing)*

To understand the egregious nature of the United States' deviations from the Treaty, it is first necessary to understand the role of treaties under United States law.[66] A treaty is defined as "[a] formally signed and ratified agreement between two nations" that is not only the law in each

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63. *See Percheman*, 32 U.S. at 51; *see also* Tsosie, *supra* note 38, at 1626 (discussing the *Percheman* decision).

64. *Percheman*, 32 U.S. at 87, *cited in part in* Tsosie, *supra* note 38, at 1626.

65. *See* Tsosie, *supra* note 38, at 1628.

66. *See* U.S. CONST. art. VI, cl. 2. The Constitution provides that:

> this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State

nation but also "[a] contract between the signatories."[67] Typically, treaties between nations bind the legislatures and the judiciaries of those countries to strict adherence.[68] This is true in most nations as it is with the United States. In the United States, the Supremacy Clause of the Federal Constitution provides that treaties will operate upon and bind both state and federal judiciaries as the supreme law of the land with equal force and authority as any federal statute.[69] This notion is also supported by judicial interpretation.[70] In *DeGeofroy v. Riggs*[71] the United States Supreme Court established that the Constitution directs the courts of the United States to give treaties their full legal effect.[72]

These norms of treaty law and others that were in effect at the time of ratification of the Treaty[73] indicate that the Treaty, as originally constructed, should have protected the property interests of Mexican titleholders. Despite their lack of specificity, Articles VIII and IX of the Treaty guaranteed the protection of private property and ensured that those Mexican citizens remaining in the United States would have the full

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shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.; *see also* Kennett v. Chambers, 55 U.S. (14 How.) 38, 46, 49-50 (1852) (holding that treaties between the United States and other nations are the supreme law of the land and are enforced by the Constitution of the United States); Kennedy's Estate v. Richardson, 41 S.W.2d 95, 97 (Tex. Civ. App.—Austin 1931) (holding that a treaty between Scotland and the United States was superior to contrary Texas law).

67. BLACK'S LAW DICTIONARY 1507-08 (7th ed. 1999).

68. *See* United States v. Forty-Three Gallons of Whisky, 93 U.S. 188 (1876) (holding that self-executing treaties are equivalent to federal legislation); Fellows v. Blacksmith, 60 U.S. 366 (1856) (holding that valid treaties serve as the supreme law of the land and courts may not modify the effect of the treaty no more than they may modify federal legislation); Strother v. Lucas, 37 U.S. 410 (1838) (holding that treaties bind all courts of the signing nations); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 cmt. a (1986) (stating that treaties bind the parties, must be performed in good faith, and that treaties will "survive restrictions imposed by domestic law").

69. *See* U.S. CONST. art. VI, cl. 2. *See also* Fairfax v. Hunter, 11 U.S. (7 Cranch) 603 (1813).

70. *See* DeGeofroy v. Riggs, 133 U.S. 258 (1890); *Fairfax*, 11 U.S. at 603. *See also* Guadalupe T. Luna, *On the Complexities of Race: The Treaty of Guadalupe Hidalgo and Dred Scott v. Sanford*, 53 U. MIAMI L. REV. 691 (1999).

71. 133 U.S. 258 (1890).

72. *See id.* at 271 (addressing the effect of treaty interpretation on the descent of real property from citizens of the United States to citizens of France). *See also* Luna, *supra* note 70, at 691-701.

73. *See* sources cited *supra*, note 5. It is important to note that the preceding cases and their propositions concerning United States treaty law are used only to illustrate the options the Supreme Court possessed when interpreting the Treaty of Guadalupe Hidalgo, and not to imply any legally incorrect or unsupportable holding passed down by the Court on this subject.

protection of American law.[74] In the vast majority of cases, however, these guarantees have not been honored.[75]

A further cause of the Treaty's failure through United States interpretation is its status as a non self-executing document.[76] Because the Treaty is non self-executing, Congress has been able to implement various measures of legislation that have effectively diminished the promises made to Mexican citizens who elected to remain on their lands and become citizens of the United States.[77]

The distinction between self-executing and non self-executing treaties is a legal technicality of treaty interpretation almost entirely unique to the United States.[78] The distinction is crucial to an understanding of the United States' failure to adhere to the spirit of the Treaty because it is this distinction that established the legal authority for Congress to modify the aims of the Treaty.[79]

The notion of self-executing and non self-executing treaties was created by the Supreme Court of the United States in 1829.[80] The Court established that non self-executing treaties require legislative implementation

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74. *See* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 4.

75. *See* sources cited *supra* note 5.

76. *See* Klein, *supra* note 28, at 218. Professor Klein notes that because the Treaty is non self-executing in nature, Mexican property rights required congressional action for ratification and were not ratified by the Treaty itself. *See id.* The author further asserts that the resultant need to overcome these legal obstacles coupled with the frequently prohibitive costs of litigation caused landowners to lose their land, even where the grants had been previously confirmed. *See id.*

77. *See id.*

78. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 68, at § 210 n.5 (1986) (stating that the United States is one of the few states that recognize a distinction between self-executing and non self-executing treaties). *See also* Klein, *supra* note 28, at 218-19 (noting the contrast in policy in the United States); David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1449-50 (1999); Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 AM. U. J. INT'L L. & POL'Y 559, 667 n.415 (1996).

79. Despite this eventual designation, it was most assuredly within the power of the Supreme Court to look to the language of the Treaty as protecting these rights. *See* United States v. Forty-Three Gallons of Whisky, 93 U.S. 188 (1876) (holding that treaties are equivalent to federal legislation); Fellows v. Blacksmith, 60 U.S. 366 (1856) (holding that valid treaties serve as the supreme law of the land and courts may not modify the effect of the treaty no more than they may modify federal legislation); Strother v. Lucas, 37 U.S. 410 (1838) (holding that treaties bind all courts of the signing nations).

80. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 313-14 (1829). *See also* Klein, *supra* note 28, at 218-19 (discussing self-executing and non self-executing treaties as established by *Foster v. Neilson*).

in order to take effect.[81] Conversely, a self-executing treaty may take effect and be binding on courts without legislative action.[82] However, determining whether a treaty is self-executing is far from an exact science.[83]

As noted, a self-executing treaty is one "that may be enforced in the courts without prior legislation by Congress."[84] Thus, a self-executing treaty operates without the need for, or benefit of, implementing legislation.[85] A self-executing treaty is therefore the legal equivalent of a con-

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81. *See* Lori F. Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI-KENT L. REV. 515, 516 (1991).

82. *See id.* at 516-17. *See also* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 73 (1988).

83. *See* Damrosch, *supra* note 81, *cited in* Klein, *supra* note 28, at 218. Two cases decided by the Supreme Court illustrate the confusion. In *Foster v. Neilson*, the Court adjudicated a Spanish land grant in the Florida Territory (modern day Western Louisiana). *See Foster*, 27 U.S. at 196. The Court held in *Foster* that under the 1819 Treaty of Cession, certain Spanish land grants were to remain in the possession of those holding title at the time of the Treaty, and their title was legally declared valid as if a change in sovereignty had not taken place. *See id.* at 315-17. The court, however, as it has held with the Treaty of Guadalupe Hidalgo, held that the Treaty of Cession merely promised future action on the part of the legislature and, on its own, did not serve as a rule for the court. *See id.* at 314. The holding is significant for the purposes of this analysis, however, because of its recognition of the theoretical possibility of a self-executing treaty existing under American law. *See id.* at 313-14. Offered in dicta by Justice Marshall, this recognition was based on the seemingly obvious premise that the United States Constitution provides that treaties entered into by the nation are to be regarded as the law of the land. *See id.* The court reasoned that treaties are to be regarded as equivalent to legislative acts "whenever [the treaty] operates of itself without the aid of any legislative provision." *Id.* at 314. The Court continued, however, noting that where a party to a treaty contracts to engage in particular acts, the treaty takes on a political dimension and therefore requires political (legislative) action in order to be binding on the courts. *See id.* This position was altered by the Court four years later in *United States v. Percheman*. *See* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833). In *Percheman*, Justice Marshall reversed his opinion and declared that the treaty with Spain had in fact been self-executing. *See id.* at 88-89. Justice Marshall held that where there is room for interpretation, as in *Percheman*, policy considerations may play a substantial part in the court's decision. *See id.* Thus, although the Supreme Court had retroactively declared that the treaty with Spain was in fact self-executing, the Treaty of Guadalupe Hidalgo received no such favorable construction, even though this Treaty also dealt with the concerns of private property owners of Spanish land grants after foreign acquisition of territory. *See also* Klein, *supra* note 28, at 218-20. Some current scholars characterize the Treaty as non self-executing specifically due to the Senate's removal of Article X before the Treaty's ratification. *See* Guadalupe T. Luna, *En El Nombre de Dios Todo-Poderoso: The Treaty of Guadalupe Hidalgo and Narrativos Legales*, 5 SW. J. L. & TRADE AM. 45, 70 (1998).

84. Luna, *supra* note 83 (citing to Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695 (1995)).

85. *See, e.g.*, Dainese v. Hale, 91 U.S. 13, 18-19 (1875); Kennett v. Chambers, 55 U.S. (14 How.) 38, 46 (1852).

gressional act to the extent that it affects personal rights.[86] A non self-executing treaty, on the other hand, may "not be enforced in the courts without prior legislative implementation."[87]

The distinction is significant in that all official treaties of the United States are deemed to be the "supreme law of the land."[88] The Constitution directs the federal courts to uphold this mandate.[89] In addition, the Supremacy Clause of the Constitution provides that a treaty acting on its own force will nullify conflicting state laws and prior-existing federal laws.[90] Moreover, Congress is authorized by the Supremacy Clause to refine or alter treaties, although such alterations may not compromise the intent of the treaty.[91] Thus, by making the Treaty non self-executing in nature, the Senate effectively emasculated the Treaty as a legal document and effectuated more control over the disposition of the lands acquired by annexation.[92]

The overall failure of the United States to utilize applicable law in order to uphold the promises of the Treaty coupled with the legislature's increasing control over the application of the Treaty in American law illustrate the underlying intentions of the United States government to deny private property rights in favor of national acquisition. The following section highlights the sections of the Treaty of Guadalupe Hidalgo as they were written and the protections that they appear to afford.

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86. U.S. CONST. art. VI. *See also Kennett*, 55 U.S. at 46 (holding that a self-executing treaty acts with the force of a legislative enactment and is essentially equivalent to an act of Congress); Kennedy v. Richardson, 41 S.W.2d 95, 98 (Tex Civ. App. 1931) (stating that "[a] treaty is supreme only when it is made in pursuance of that authority which has been conferred on the treaty-making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress.").

87. Luna, *supra* note 83.

88. U.S. CONST. art. VI.

89. *Id. See also* Luna, *supra* note 83.

90. Luna, *supra* note 83, at 71.

91. *See id.* (citing Vasquez, *supra* note 84, at 699).

92. The Supreme Court in *United States v. Percheman* provided legal precedent protecting the property rights of landowners in Louisiana and the Florida Territories. *See* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833). The legal issue in *Percheman* centered on a treaty between Spain and the United States. *See id.* at 56-57. In its holding, the Court found that the treaty was self-executing and therefore required no federal implementation legislation. *Id.* at 88-89. *See also* Luna, *supra* note 83, at 71. The treatment of Anglo settlers by the Court in the *Percheman* decision viewed against the injustices forced upon grantees of Mexican descent has the unfortunate but undeniable effect of illustrating the racial factors underlying the disparate treatment between those of Mexican descent and Anglo-Americans. *See id.* Through the Land Acts and various other policies and decisions, courts and legislatures essentially re-wrote the Treaty of Guadalupe Hidalgo, and in doing so, laid the groundwork for a century and a half of inequity for those of Mexican descent under American law.

IV. THE TREATY OF GUADALUPE HIDALGO

A. *The Treaty as Ratified*

In addition to the $15 million paid to the Mexican government,[93] the United States agreed to several conditions designed to protect the rights of Mexican citizens who elected to remain on their land after the transfer of the Northwest territories of Mexico to United States control.[94] Essentially, the Treaty extended citizenship status to the former Mexican citizens living in the ceded territories and provided protection for private property rights as well as religious and political rights.[95] Further, it accomplished a number of formalities, such as removing American troops from territories remaining under Mexico's control and establishing new national borderlines.[96] The language of the Treaty is in conformity with the practice of European colonial nations of the time by promising to protect the property rights of its colonized people.[97] In a similar fashion, the Treaty appears to establish that Mexican land holders owned their property in fee simple.[98] However, the ratified version of the Treaty and its subsequent interpretation had the ultimate effect of imposing conditions not entirely consistent with the spirit and intent of the Treaty as originally agreed to by the Mexican government.[99] As this American interpretation evolved over time, it allowed United States courts to deny land claims based on the claimant's inability to demonstrate perfected title.[100]

Articles VIII, IX, and the deleted Article X specifically sought to protect the rights of citizenship and property.[101] When examined apart from subsequent American actions denying these provisions any real force of law, these articles appear to act as a promise of individual rights. How-

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93. *See* GRISWOLD DEL CASTILLO, *supra* note 5, at 40 (stating that the original amount of compensation totaled $20 million dollars; however, this amount was unilaterally reduced by Nicholas Trist to the final total of $15 million).

94. *See generally* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 4, at 929-30. *See also* Tsosie, *supra* note 38, at 1625.

95. *See generally* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 4 (Articles VIII and IX specifically refused the protections that were to be guaranteed to Mexicans in the annexed territory).

96. *See generally id.*

97. *See id. See also* Tsosie, *supra* note 38, at 1628.

98. *See* Tsosie, *supra* note 38, at 1628.

99. *See id.* at 1619 (identifying Mexican and Mexican-American histories of the United States' interpretation of the Treaty).

100. *See id.* at 1628.

101. *See* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 4. *See also* Tsosie, *supra* note 38, at 1626; Christopher David Ruiz Cameron, *One Hundred Fifty Years of Solitude: Reflections on the End of the History Academy's Dominance of Scholarship on the Treaty of Guadalupe Hidalgo*, 5 SW. J. L. & TRADE AM. 83, 88-89 (1998).

ever, when viewed from an historical perspective by taking into account America's manipulation of the Treaty, it is clear that the United States never intended to fulfill its promises. Accordingly, the intended effect of these articles is the focal point of this section of the comment. By comparing the text of the Treaty as originally drafted to the text as finally ratified, the acquisition and control of increased national territory continues to emerge as the controlling factor behind United States action prior and subsequent to ratification of the Treaty.

B. *Article VIII*

Article VIII[102] of the Treaty gave Mexicans in the ceded territory the option of remaining in the United States and accepting full citizenship, relocating to territory still under the control of Mexico, or remaining in the United States while retaining Mexican citizenship.[103] Those who elected to stay had one year in which to officially retain Mexican citizenship or to accept citizenship in the United States.[104] Those who made no election within one year were deemed to have elected American citizenship.[105] Moreover, those who became citizens of the United States lost

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102. *See* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 4, at 929-30. The text of Article VIII in its entirety reads as follows:

> Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican [R]epublic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax or charge whatever.
>
> Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.
>
> In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.

Id.

103. *See id. See also* Klein, *supra* note 28, at 215; Tsosie, *supra* note 38, at 1625.

104. *See* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 4, at 929-30. *See also* Tsosie, *supra* note 38, at 1625.

105. *See* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 4, at 929-30. *See also* Tsosie, *supra* note 38, at 1625 (noting that Mexicans had one year to elect whether or not to retain citizenship).

the protection afforded them by the Mexican government and law.[106] However, due to the Treaty's conferral of the full protection of the laws of the United States, this loss of protection of Mexican law was presumably insignificant.[107] The laws and customs of the United States, however, were entirely foreign to the inhabitants of the annexed territory, and the federal government extended no special protection or guardianship by which to ease the transition of governments.[108]

During this period, Mexican Americans and Native Americans were especially vulnerable to attacks on their property.[109] The federal government eventually established an Indian Claims Commission in order to remedy any infringement upon lands in the possession of Native Americans via treaties with the United States.[110] No such commission has ever been created to address the similar problems that Mexican landowners faced when attempting to retain ownership of their property or when seeking compensation for the wrongful taking of their property.[111] Furthermore, Article VIII protected the rights of Mexican property owners who were not domiciled in the ceded territories at the time of ratification of the Treaty.[112] Lastly, Article VIII imposed upon the courts of the United States the task of distinguishing between vacant and validly held land consisting of hundreds of Spanish and Mexican land grants totaling millions of acres.[113] Admittedly, this was not easy to accomplish. The inherent difficulties in this type of process, coupled with national eco-

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106. *See* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 4, at 929-30; *see also* Klein, *supra* note 28, at 215 (stating that Mexicans lost citizenship ties with Mexico as a result of their electing United States citizenship).

107. *See* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 4, at 929-30.

108. *See* Klein, *supra* note 28, at 215.

109. Unlike treaties between the United States and Native Americans, the Treaty of Guadalupe Hidalgo created no federal trust duties for the thousands of Mexican Americans and Native Americans affected by the Treaty. *See, e.g.*, Havasupai Tribe v. United States, 752 F. Supp. 1471, 1487-88 (D. Ariz. 1990).

110. *See* Indian Claims Commission Act of 1946, Pub. L. No. 726, ch. 959, § 2, 60 Stat. 1049, 1050 (omitted from 25 U.S.C. § 70 upon termination of Commission on Sept. 30, 1978). *See also* Nell Jessup Newton, *Indian Claims in the Court of the Conqueror*, 41 AM. U. L. REV. 753 (1992) (explaining structure and aims of the commission and its ultimate failures).

111. The Fifth Amendment to the Constitution provides that no person shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation. U.S. CONST. amend. V.

112. *See* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 4, at 929-30. *See also* Tsosie, *supra* note 38, at 1625.

113. *See* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 4, at 929-30; *see also* United States v. Moreno, 68 U.S. 400 (1864) (noting that the lack of legal and academic inquiry into Mexican and Spanish land grants makes precise numbers difficult to verify); *see also* Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).

nomic concerns taking priority over individual rights, created a tendency for courts to *adjudicate* the validity of title derived from Spanish and Mexican grants, instead of simply *distinguishing* between vacant and legally owned land, as was required by the Treaty.[114]

C. *Article IX*

As originally drafted, Article IX[115] protected both the civil rights and the property rights of the former citizens of Mexico who elected to remain in the ceded territories.[116] The original Article IX proclaimed that

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114. *See* Klein, *supra* note 28, at 209.

115. *See* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 4, at 930. As it was ratified, Article IX reads in its entirety:

> Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

Id.

116. *See id.* The original text of Article IX was substantially different than the version finally ratified. A comparison of the differences is especially informative when inquiring into the motivations of the United States behind the war with Mexico and its future plans concerning the property rights of Mexican landholders. The original text of Article IX read as follows:

> The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding Article, shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights of citizens of the United States. In the mean time, they shall be maintained and protected in the enjoyment of their liberty, their property, and the civil rights now vested in them according to the Mexican laws. With respect to political rights, their condition shall be on an equality with that of the inhabitants of the other territories of the United States; and at least equally good as that of the inhabitants of Louisiana and the Floridas, when these provinces, by transfer from the French Republic and the Crown of Spain, became territories of the United States. The same most ample guaranty shall be enjoyed by all ecclesiastics and religious corporations or communities, as well in the discharge of the offices of their ministry, as in the enjoyment of their property of every kind, whether individual or corporate. This guaranty shall embrace all temples, houses and edifices dedicated to the Roman Catholic worship; as well as all property destined to it's [*sic*] support, or to that of schools, hospitals and other foundations for charitable or beneficent purposes. No property of this nature shall be considered as having become the property of the American Government, or as subject to be, by it, disposed of or diverted to other uses. Finally, the relations and communication between the Catholics living in the territories aforesaid, and their respective ecclesiastical authorities, shall be open, free and exempt from all hindrance whatever, even although such authorities should reside within the limits of the Mexi-

the Mexicans who elected to remain in the ceded territories would be "protected in the enjoyment of . . . their property . . . according to the Mexican laws."[117] Furthermore, Article IX originally stated that these citizens' political rights "shall be on an equality with that of the inhabitants of the other territories of the United States."[118] The Senate, however, chose to strike this article as it originally read and replaced it with a far more ambiguous mechanism which ultimately served only to dilute these citizens' rights.[119]

The history of Article IX's modification mirrors the general history of the war with Mexico and the United States' failure to adhere to the spirit of the Treaty of Guadalupe Hidalgo. As originally drafted, Article IX specifically protected Mexican property holders.[120] The United States Senate likely saw this conferral as a potential impediment to the control and use of the lands gained by the war with Mexico.[121] This would be consistent with the view that there is no point to fighting an expansionist war if the government does not gain full control and disposition of the acquired territory.[122] The vague promises conveyed in Article IX ensured that the United States would gain full control of its newly annexed territory with a minimum of legal obstacles.

Reading the vague promises of Articles VIII and IX together suggests that the United States initially intended to protect Mexican Americans in their private property interests during the transition from one government to another.[123] This would prove a difficult promise to keep because the Treaty also required the United States to distinguish vacant from legally held land by determining the validity of hundreds of Spanish and Mexican land grants made over a span of 150 years.[124] However, it was a contingency both nations agreed to; in fact, the deleted Article X and the

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can Republic, as defined by this treaty; and this freedom shall continue, so long as a new demarcation of ecclesiastical districts shall not have been made, conformably with the laws of the Roman Catholic Church.

5 U.S. DEP'T OF STATE, PUB. NO. 1017, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 381 (Hunter Miller ed., 1937), *reprinted in* GRISWOLD DEL CASTILLO, *supra* note 5, at 179-80.

117. GRISWOLD DEL CASTILLO, *supra* note 5, at 46.

118. *Id.*

119. *See* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 4, at 930; *see also* GRISWOLD DEL CASTILLO, *supra* note 5, at 47.

120. *See* GRISWOLD DEL CASTILLO, *supra* note 5, at 46.

121. *See generally id.* at 46-53 (illustrating the aims of the Mexican government's ratification of the Treaty and the interplaying effects of the modification of Article IX and the deletion of Article X).

122. *See id.*

123. *See* Tsosie, *supra* note 38, at 1627-28.

124. *See* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 4; *see also* Klein, *supra* note 28, at 209; Tsosie, *supra* note 38, at 1628.

subsequent Protocol of *Querétaro* illustrate the Mexican government's concern over the status of Mexican property holders who elected to remain in the United States in hopes of retaining full title to their rightful property.[125] Instead, the deletion of Article X and the conferral on American courts of the duty of determining the validity of land grant claims illustrate America's true desire to continue expansion and to retain full control over this valuable new territory.[126]

D. *Article X*

The Treaty of Guadalupe Hidalgo contained twenty-three articles when initially agreed to by the Mexican government.[127] After it was signed, however, the United States Senate omitted Article X[128] in order to avoid the arduous task of settling land title disputes resulting from the annexation of Texas.[129] While the United States might have simply been removing the article to relieve itself from a difficult task, the removal of Article X is characteristic of the disregard the United States has had for the Treaty. Although the Senate was within its constitutional power to re-

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125. *See* Tsosie, *supra* note 38, at 1628.

126. *See id.*

127. *See* Luna, *supra* note 83, at 59.

128. The original Treaty included a tenth article which was deleted from the document before ratification. The intended text of Article X read as follows:

> All grants of land made by the Mexican Government or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid, to the same extent that the same grants would be valid, if the said territories had remained within the limits of Mexico. But the grantees of lands in Texas, put in possession thereof, who, by reason of the circumstances of the country since the beginning of the troubles between Texas and the Mexican Government, may have been prevented from fulfilling all the conditions of their grants, shall be under the obligation to fulfill the said conditions within the periods limited in the same respectively; such periods to be now counted from the date of the exchange of ratifications of this treaty: in default of which the said grants shall not be obligatory on the state of Texas, in virtue of the stipulations of this Article.
>
> The foregoing stipulation in regard to grantees of land in Texas, is extended to all grantees of land in the territories aforesaid, elsewhere than in Texas, put in possession under such grants; and, in default of the fulfillment of the conditions of any such grant, within the new period, which, as is above stipulated, begins with the day of the exchange of ratifications of this treaty, the same shall be null and void.

U.S. DEP'T OF STATE, *supra* note 116, at 381, *reprinted in* GRISWOLD DEL CASTILLO, *supra* note 5, at 181. Miller provides the history behind the omission of the article, which states that "the third amendment of the Senate strikes from the Treaty the 10th Article. It is truly unaccountable how this article should have found a place in the senate." *Id.* Undoubtedly the speaker of this statement recognized that the inclusion of Article X would prevent the political and judicial institution of America from subjecting valid grantees to their policy decisions. *See id.*

129. *See* Luna, *supra* note 83.

move Article X in its entirety, the action created the multitude of problems that have plagued Mexican Americans in the American Southwest for the last 150 years.[130] Mexico strongly objected to the removal of Article X, understanding the likely repercussions to Mexican property holders.[131] Mexico, however, had little bargaining strength in the negotiations.[132]

In effect, Article X would have created a clear affirmation of land titles originating from the Mexican government, in particular those in the State of Texas.[133] To this end, Article X stated that:

> [a]ll grants of land made by the Mexican Government or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid, to the same extent that the same grants would be valid, if the said territories had remained within the limits of Mexico.[134]

Article X also would have extended the time in which Mexican landowners would have to perfect their titles.[135] This provision existed due to the fact that after Texas declared independence in 1836, many Mexicans fled the territory, thus temporarily abandoning their rightfully owned land.[136] Secretary of State James Buchanan pushed for the omission of Article X due to his feelings that the article was unnecessary, and that it would endanger the status of Anglo settlers in Texas.[137] Buchanan believed, or at least asserted, that the Treaty as finally drafted would provide sufficient protection for Mexican property owners.[138]

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130. Under the Federal Constitution, the President creates treaties with the advice and two-thirds concurrence of the Senate; the Senate is under no obligation to adopt a treaty in its entirety, but is free to amend or modify it as it sees fit. *See* U.S. CONST. art. II, § 2; N.Y. Indians v. United States, 170 U.S. 1, 23 (1878); Haver v. Yaker, 76 U.S. (9 Wall.) 32, 35 (1869). *See generally* Kevin C. Kennedy, *Conditional Approval of Treaties by the U.S. Senate*, 19 LOY. L.A. INT'L & COMP. L. REV. 89 (1996).

131. *See* GRISWOLD DEL CASTILLO, *supra* note 5, at 49.

132. *See id.* at 50-51.

133. *See id.* at 44, 180-81. Article X would have offered protection to Tejano grantees, whose problems concerning title stemmed from the boundary dispute between Mexico and the United States and were well known and widely understood. *See id.*

134. *Id.* at 180; *see also* Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a "Naked Knife,"* 4 MICH. J. RACE & L. 39, 70-71 (1998).

135. *See* Tsosie, *supra* note 38, at 1626.

136. *See id.*

137. *See* Luna, *supra* note 83, at 59.

138. *See id.* (quoting Buchanan as stating "the present Treaty provides amply and specifically . . . for the security of property of every kind belonging to Mexicans . . . the property of foreigners under our Constitution and laws, will be equally secure without any Treaty stipulation").

E. *The Protocol of Querétaro*

The debate over the modification of Article IX and the wholesale omission of Article X from the Treaty resulted in the drafting of The Protocol of *Querétaro*.[139] The Protocol, which was signed by the United States' representatives to the Treaty, effectively dictated that the Treaty should be interpreted as if Article X had remained an operative part of the Treaty.[140] In part, the Protocol stated:

> [t]he American government by suppressing the Xth article of the Treaty . . . did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants . . . preserve the legal value which they may possess and the grantees may cause their legitimate titles to be acknowledged before the American tribunals.[141]

Despite the apparent assurances that United States tribunals would protect property rights, the Protocol of *Querétaro* would prove to be a dead letter.[142] Secretary of State James Buchanan himself dismissed the Protocol as merely a "record of conversations between diplomats . . . [lacking] the force or effect of law."[143] The Supreme Court held in *Cessna v. United States*[144] that the Protocol of *Querétaro* carried no legal relevance when deciding land grant cases, thus rendering Secretary Buchanan's questionable opinions moot.[145]

It is clear that if the Treaty had retained its original format, it would have conformed to the established practice of international law, affording citizens of conquered territories full protection for their private property.[146] What seems equally obvious is that the United States laid the foundation for future control of the property acquired in the war with Mexico by omitting Article X from the final version of the Treaty and denouncing the Protocol of *Querétaro* as legally ineffective. Although

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139. *See* GRISWOLD DEL CASTILLO, *supra* note 5, at 54; *see also* Luna, *supra* note 83, at 59-60.

140. *See* Ruiz Cameron, *supra* note 42, at 15.

141. U.S. DEP'T OF STATE, *supra* note 116.

142. *See* Griswold del Castillo, *supra* note 41, at 38 (asserting that the greatest injustices occurred in the lack of protection of private rights despite the promises of the Protocol of *Querétaro*).

143. Tsosie, *supra* note 38, at 1627 (citing Ruiz Cameron, *supra* note 101, at 90); *see also* GRISWOLD DEL CASTILLO, *supra* note 5, at 54.

144. 169 U.S. 165 (1898).

145. *See id.* (holding that the Protocol of *Querétaro* has no legal effect); *see also* Griswold del Castillo, *supra* note 41, at 36.

146. *See, e.g.*, Strother v. Lucas, 37 U.S. 410 (1838) (holding that property rights of private citizens are protected subsequent to cession of territory by way of treaty, regardless of presence or absence of specific stipulations to that effect).

the Mexican-American War ensured that the newly annexed territories would become part of the United States, it did not ensure that the land then owned and controlled by Mexican expatriates would come under United States control. It is a logical assumption that this annoyed the powers in the federal government. After all, it seems nonsensical to increase a nation's territory by one-third if the federal government lacks sufficient power to control the disposition of that land. Thus, the deletion of Article X, along with its guarantees of private property rights, is entirely consistent with the imperialist policies of the United States government in the nineteenth century.

V. THE TREATY, FEDERAL LEGISLATION, AND JUDICIAL INTERPRETATION

Because the property provisions of the Treaty of Guadalupe Hidalgo are not self-executing, they required federal legislation to carry legal effect. The result of this interpretation is that Mexican property rights had to await ratification by congressional action and were not ratified by the Treaty itself, as the original wording of the Treaty implied.[147] As applied by the United States, then, the Treaty in its entirety was not "the law of the land."[148] The federal implementation legislation that followed created a confusing web of legal requirements through which Mexican property owners had to maneuver in order to perfect their title.[149] Even in the rare cases where a property owner managed to perfect title successfully, the high cost of litigation in the United States frequently meant that his "victory" ultimately cost him the very thing for which he had fought.[150]

When analyzed in light of the omission of Article X and the legislation[151] implemented pursuant to the Treaty, the omnipresent desire for land continues to emerge as the driving force behind the ratification of

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147. *See* Klein, *supra* note 28, at 218 (citing LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 157 (1972)).

148. *Id.*

149. *See, e.g.*, Whitney v. United States, 167 U.S. 529, 547 (1897); Teschemacher v. Thompson, 18 Cal. 11 (1861).

150. *See* Klein, *supra* note 28, at 218 (citing *Teschemacher*, 18 Cal. 11). Generally, courts virtually ignored the language of the Treaty in favor of a judicial interpretation that emphasized the Treaty's implementing legislation. *See id.* Over time, these implementation statutes were interpreted more and more strictly. *See id.* In short, the courts abandoned any moralistic approach to interpreting the intent of the Treaty in favor of a more rigid construction of the will of Congress. *See id.* Therefore, when analyzing the demise of Mexican-American property rights pursuant to the Treaty, it is important to look to this history of omitted guarantees pursuant to legislative manipulation of the Treaty.

151. *See* An Act to Ascertain and Settle the Private Land Claims in the State of California, ch. 41, 9 Stat. 631 (1851).

the Treaty. The United States' long term handling of the Treaty through legislative acts and subsequent court decisions demonstrate a clear intent to put the nation's expansionist policies ahead of the rights of its legal citizens and its agreements with the Mexican government. In a nation founded on individual, not societal or governmental rights, this is unacceptable, and the promotion of such a policy demands formal redress by the federal government. The California Land Act of 1851[152] and the Supreme Court case of *Botiller v. Dominguez*,[153] which analyzed the legality of the California Land Act, serve as concise illustrations of Congress' and the courts' unwillingness to uphold private rights at the cost of national economic expansion.

A. *The California Land Act of 1851*

One result of the omission of Article X from the Treaty and the subsequent status of the Treaty as non self-executing was the federal legislature's implementation of the California Land Act of 1851 (the Land Act).[154] The Land Act required Spanish and Mexican land grantees to prove ownership by presenting a special Board of Land Commissioners with proof of the validity of their title.[155]

The Land Act provided that "the law of nations, the laws, usages and customs of the Government from which the claim is derived, the principles of equity and the (prior) decisions" would be utilized in order to properly adjudicate these claims.[156] Where a grantee was able to prove

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152. *See id.*

153. 130 U.S. 238 (1889).

154. *See* An Act to Ascertain and Settle the Private Land Claims in the State of California, *supra* note 151; *see also* Frederico M. Cheever, Comment, *A New Approach to Spanish and Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe Hidalgo*, 33 UCLA L. Rev. 1364, 1393 n.136 (1986) (discussing the debates in the California Legislature surrounding the passage of the act).

155. *See* An Act to Ascertain and Settle the Private Land Claims in the State of California, *supra* note 151. The Act provided:

> That each and every person claim lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced on behalf of the United States, and to decide upon the validity of said claim . . .

Id; *see also* Luna, *supra* note 83, at 60.

156. An Act to Ascertain and Settle the Private Land Claims in the State of California, *supra* note 151; *see also* Luna, *supra* note 83, at 60.

ownership, a survey would be taken and then a patent would be issued.[157] The Land Act additionally established procedure for judicial review including appeals to the United States Supreme Court.[158] In addition, a two-year statute of limitations provided that any land at issue would revert to the public domain if the claimant was either unable to present a claim or unable to subsequently prove fee ownership within the allotted time.[159]

The significance of the California Land Act is that its implementation runs contrary to the language of the Treaty and serves as another example of the federal government using its powers to dispossess Mexican Americans.[160] The Treaty had promised to "inviolably respect" the property of Mexican landowners and to determine the validity of these claims under Mexican and Spanish law.[161] Instead of following the letter and spirit of the Treaty, however, the federal legislature established its own interpretation of the manner in which title to land in the ceded territories should be determined when it enacted the California Land Act.[162] The end result in the vast majority of cases was that the Treaty offered virtually no protection to Mexican and Mexican-American landowners. *Botiller v. Dominguez*[163] represents the prime example of the judiciary's unwavering tendency to follow the lead of the legislature in denying the Treaty any tangible legal effect.

As noted, American courts increasingly deferred to the intent of Congress in the years following ratification of the Treaty when implementing the requirements of Article VIII, leading to an interpretation that grew more and more limited over time. In addition, because the Treaty came to be regarded as non self-executing, Congress was free to establish new legal mechanisms for the confirmation of Mexican property rights.[164] Under these mechanisms, the burden of proof was always entirely on the Mexican property holder; each landowner was required to prove the validity of their claim under the law that the grant had been made, this being either Spanish or Mexican law.[165] Despite this deceptively simple

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157. *See* An Act to Ascertain and Settle the Private Land Claims in the State of California, *supra* note 151; *see also* Luna, *supra* note 83, at 60-61.

158. *See* An Act to Ascertain and Settle the Private Land Claims in the State of California, *supra* note 150; *see also* Luna, *supra* note 83, at 61.

159. *See* An Act to Ascertain and Settle the Private Land Claims in the State of California, *supra* note 151; *see also* Luna, *supra* note 83, at 61.

160. *See* Luna, *supra* note 83, at 61.

161. *See* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 4, at 929.

162. *See* An Act to Ascertain and Settle the Private Land Claims in the State of California, *supra* note 151.

163. 130 U.S. 238, (1889).

164. *See* Luna, *supra* note 83.

165. *See* Klein, *supra* note 28, at 222.

format, factors involving conflicting legal property concepts, difficulties concerning proof, and outright racial and cultural biases made this process a complicated one.[166] In the end, a substantial number of claims of Mexican landowners were not recognized by American courts, and this paved the way for Anglo possession and settlement in the territories ceded by the Treaty.[167] *Botiller v. Dominguez* is representative of this trend.

B. *Botiller v. Dominguez*

> This court . . . has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard.[168]

Botiller v. Dominguez is perhaps the case most illustrative of the American judicial system's failure to uphold and enforce the spirit of the Treaty of Guadalupe Hidalgo.[169] In *Botiller*, Dominga Dominguez brought an action to recover possession of her land from settlers who had claimed title under federal homestead laws.[170] The grant under which Dominguez held title was undisputed and perfected according to the laws of Mexico; however, it had not been confirmed by the California Land Claims Commission as required by the California Land Act of 1851.[171] Although both the trial court and the Supreme Court of California affirmed Dominguez's title, the United States Supreme Court reversed and held that no title of Spanish or Mexican origin can be valid unless confirmed by the Land Claims Commission within the time period allotted by statute.[172]

Despite the Court's blatant refusal to adhere to the spirit of the Treaty, or to even uphold the decision of the California Supreme Court on equitable grounds,[173] the Court's rationale was neither ambiguous nor misleading. Specifically, the Court asserted that the discovery of gold in

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166. *See id.* at 218.

167. *See id.* at 222-23.

168. *Botiller*, 130 U.S. at 247; *see also* Klein, *supra* note 28, at 222-23; Ruiz Cameron, *supra* note 42.

169. *See Botiller*, 130 U.S. at 238; *see also* Klein, *supra* note 28, at 222-23; Ruiz Cameron, *supra* note 42.

170. *See Botiller*, 130 U.S. at 238; *see also* Klein, *supra* note 28, at 222-23; Ruiz Cameron, *supra* note 42.

171. *See Botiller*, 130 U.S. at 238-39; *see also* Klein, *supra* note 28, at 222; Ruiz Cameron, *supra* note 42.

172. *Botiller*, 130 U.S. at 255-56; *see also* Klein, *supra* note 28, at 222; Ruiz Cameron, *supra* note 42.

173. *See Botiller*, 130 U.S. at 247.

California in 1846 took precedence over the rights of Mexican property owners.[174] The court stated succinctly that "the necessity was presented for ascertaining by some means the validity of the claims of private individuals within its boundaries, and to establish them as distinct from the lands which belonged to the government."[175] Thus, for purely material reasons, specifically the strong national interest in possessing lands rich in gold, the Supreme Court overturned the holdings of the trial court and the California Supreme Court.[176] In effect, this decision robbed a United States citizen of her validly owned property while simultaneously stuffing the coffers of the federal government. Thus, by unnecessarily deferring to the federal legislature, the Supreme Court invalidated title perfected twenty years prior by the Mexican government and ignored the letter and intent of the Treaty. This case is significant in its illustration of the Court's shift towards congressional deferral in title disputes involving Mexican and Spanish land grants in the territories acquired after the United States' victory in the Mexican-American War.[177]

Ironically, in *United States v. Percheman*, the Supreme Court had previously interpreted a similar statute as irrational.[178] The Court voided the statute because of its requirement that holders of Spanish land grants file their grants with a land commissioner within one year or risk losing their title.[179] Justice Marshall stated that "it is impossible to suppose, that Congress intended to forfeit real titles, not exhibited to their commissioners within so short a period."[180] In contrast, the Court in *Botiller* accepted completely Congress' apparent intention that real and legitimate titles were to be forfeited if not presented to the land commission within the two year statutory period.[181] As noted, this interpretation was largely influenced by political concerns resulting from the discovery of gold in California.[182] The Gold Rush brought with it the urgent need to distinguish private ownership of land due to the massive movement of settlers into the region.[183] The Court therefore favored a broad reading of the

174. *See id.* at 244-245.

175. *Id.* at 244.

176. *See id.*

177. *See* Klein, *supra* note 28, at 222.

178. *See* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

179. *See id.* at 90 (stating that "[I]t is impossible to suppose, that congress intended to forfeit real titles, not exhibited to their commissioners within so short a period"), *cited in* Klein, *supra* note 28, at 222.

180. *Percheman*, 32 U.S. at 90.

181. *See Botiller*, 130 U.S. at 244.

182. *See id.* at 266.

183. *See id.* at 244.

statute in order to avoid the difficulties encountered in previous litigation involving land grants in Louisiana and Florida.[184]

In the litigation involving Louisiana and Florida, the Court noted that the entire process failed for lack of a clear and simple method for bringing the parties together to appear before a tribunal "essentially judicial in nature" in order to reach a final decision that is not subject to any review by the legislature.[185] The precedent and rationale established by *Percheman* was avoided completely in *Botiller*. Although argued by counsel representing Dominguez, the assertion was passed over by the Court without much consideration.[186]

The California Land Act of 1851 and the Supreme Court's interpretation of the Land Act in *Botiller* serve as illustrations of United States expansionist policy subsequent to the ratification of the Treaty. Additionally, they represent the general interplay between the political and judicial establishments that combined to rob Mexican Americans of their property and their rights as American citizens.

C. *The Land Claims Process Generally*

As exemplified by the requirements of the California Land Act and the Supreme Court's subsequent interpretation in *Botiller*, Mexican grantees in the Southwest were generally faced with a multitude of legal challenges to their land grant claims. Frequently, these challenges manifested themselves in the guise of constantly changing Anglo legal standards which were used against those of Mexican descent in favor of Anglo Americans.[187] For instance, American courts of law frequently required Mexican claimants to provide written or documentary proof of the validity of their claims, despite the fact that the United States military had deliberately destroyed many land related documents during America's conquest and subsequent occupation of Mexico.[188] This was not always the case for Anglo claimants, however. In many instances, Anglo settlers who lacked the requisite documentation were allowed to validate their claims based on no more than their perceived "good character."[189]

In addition, Mexican claimants frequently faced cultural impediments inherent in the land grant adjudication process; as a result, difficulties based on the language difference between the two nations were common.

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184. *See id.* at 251-52.

185. *Id.*

186. *See id.*

187. *See* Luna, *supra* note 134, at 100-01.

188. *See* Tsosie, *supra* note 38, at 1629 (citing Luna, *supra* note 134, at 87-125)

189. *See* United States v. Cambuston, 25 F. Cas. 265 (N.D. Cal. 1855) (No. 14,712). In *Cambuston*, Fremont, a California Senator, had title to his land declared valid despite admitting to losing his ownership documents. *See id.*

For example, land commissioners frequently were negligent in hiring capable interpreters.[190] This resulted in both misinterpretations of documents and a poor general understanding of the Spanish and Mexican laws of property under which these claims were supposed to be adjudicated.[191]

In addition to these formidable obstacles, there were also disadvantages in the American courts' adherence to traditional notions of Anglo property law.[192] For instance, the entire system of Mexican and Spanish land grants focuses on natural objects as a method for delineating boundaries.[193] This system is very much incompatible with the Anglo system of metes and bounds and its general insistence on very rigid boundaries.[194] By holding that the Mexican system of ecological property boundaries[195] lacked proper form, the courts were effectively armed with yet another weapon by which to dispossess Mexican Americans of their rightful property.[196] In addition, the public and economic policy of the time favored the rapid settlement of vacant western land,[197] and by utilizing the doctrine of adverse possession,[198] the courts had another legal mechanism by which to remove the disfavored Mexican titleholders in order to encourage and facilitate Anglo settlement.[199]

Despite the fact that Mexicans who remained in the United States after the war were "guaranteed" equal status as citizens by the terms of the Treaty, the courts operated in a way that effectively denied these new citizens their rights under the Federal Constitution, specifically the rights of due process and equal protection under the law.[200] It is precisely this long history of dispossession of Mexican American landholders through "legal" and governmental constructs that places the greatest badge of shame on the United States government. The legislature's and judiciary's ongoing manipulation of the Treaty and the Treaty's promises mandates a formal statement acknowledging culpability for the injustices suffered by

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190. *See* Tsosie, *supra* note 38, at 1630 (citing Luna, *supra* note 134, at 110-12).

191. *See id.*

192. *See id.*

193. *See id.*

194. *See id.*

195. An example of this ecologically based demarcation system is the Vara System. *See* Richard D. Garcia & Todd Howland, *Determining the Legitimacy of Spanish Land Grants in Colorado: Conflicting Values, Legal Pluralism, and Demystification of the Sangre de Cristo/Rael Cases*, 16 CHICANO-LATINO L. REV. 39, 40-42 (1995). Varas refer to an irrigation system utilizing strips of land leading to bodies of water. *See id.* For further explanation, see Gomez, *supra* note 15, at 1041-59.

196. *See* Tsosie, *supra* note 38, at 1630 (citing Luna, *supra* note 134, at 116-19).

197. *See id.*

198. *See* Luna, *supra* note 134, at n.52.

199. *See* Tsosie, *supra* note 38, at 1630 (citing Luna, *supra* note 134, at 120-23).

200. *See id.*

Mexican Americans. These manipulations not only damaged the economic prospects of Mexican Americans in the United States by directly dispossessing them of their rightful property, but it also established a dangerous precedent that ultimately spilled into the morals of the citizenry as a whole.

D. *Violence and Other Extra-Judicial Means of Dispossession*

> Where there is a lack of honor in government, the morals of the whole people are poisoned.[201]

In addition to the legal and legislative means by which the United States wrongfully dispossessed so many Mexican Americans of their rightful property, extra-legal means were frequently employed as well.[202] Like a physical manifestation of the judicial and legislative policies of the country itself, many Anglo Americans adopted a policy of dispossession by force by which to acquire land.[203] In the decades immediately following the ratification of the Treaty, Mexican Americans enjoyed little of the benefits that their newly gained citizenship should have imparted upon them.[204] Despite their new status as full citizens, the acquisition of rights supposedly concomitant with that citizenship remained out of grasp.[205] As Professor Griswold del Castillo notes, Mexicans in the United States "were not spared [the] violent reminders of their second class status."[206] He also notes that "kangaroo trials," riots, robberies, lynchings and other murders served as a constant reminder of the social structure of the new American Southwest.[207]

This type of discrimination was not new in America. Therefore it is not surprising that the moral tone of the American citizenry would reflect this inherently racist model, which is manifested in a system both legally and politically slanted against the rights of Mexican Americans and minorities in general. The prejudicial and immoral actions of the public must be properly viewed as a creation of inherently prejudicial and immoral political and judicial leadership.

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201. Quote of Herbert Hoover, 31st President of the United States of America. JAMES B. SIMPSON, SIMPSON'S CONTEMPORARY QUOTATIONS (1988).

202. For a general survey on this topic, see LEONARD PITT, THE DECLINE OF THE CALIFORNIOS, A SOCIAL HISTORY OF THE SPANISH SPEAKING CALIFORNIANS 1846-1890 (1970).

203. *See, e.g.*, Griswold del Castillo, *supra* note 41.

204. *See id.*

205. *See id.*

206. *Id.* at 37.

207. *See id.* at 32.

VI. CONCLUSION

During World War II, the United States government authorized the internment of thousands of Japanese Americans due to unfounded wartime paranoia and the belief, although misguided, that the constitutional rights of these Japanese Americans were inferior to the goals of perceived national security.[208] When challenged, the United States Supreme Court upheld the measure as not only constitutionally permissible, but in fact a proper action in light of the circumstances.[209] Eventually, the United States took steps to ameliorate this disturbing saga. After a long and hard fought campaign, the United States Congress passed a limited reparations bill which allocated $20,000 to each person of Japanese ancestry who was confined, relocated or dispossessed of property during this period in American history.[210] Perhaps the Act's greater contribution, however, was the official apology that accompanied it.[211]

The *Korematsu* saga presents action by the federal legislature, subsequently approved and furthered by a decision of the Supreme Court, that denied constitutional rights to minority citizens in the name of a perceived "national" interest. While the saga of Mexican Americans in the Southwest does not involve the outright detention of individuals, it nonetheless involves a governmental and judicial sanction of the deprivation of property and a wholesale relocation of a part of the American citizenry in the furtherance of political interests. Compounded over a period of 153 years, the results of this injustice stretch to all aspects of Mexican American life in the United States today.[212] Thus, it is time that the United States government address the misguided practices of the past, so that the lingering injustices that continue may be properly confronted.

United States judicial and legislative interpretation of the Treaty of Guadalupe Hidalgo has violated the spirit and the intent of the Treaty.

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208. *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 9, 1942).

209. *See* Korematsu v. United States, 323 U.S. 214 (1944).

210. *See* Civil Liberties Act of 1998, Pub. L. 100-383, 101 Stat. 903, reprinted in 50 U.S.C.A. 1989 (West 1998). It is of relevance to note that this legislation specifically excludes claims of Mexican or Native Americans concerning any property of the United States. *Id.* § 1989d. Specifically, the Act states that "nothing in this Act . . . shall be construed as recognition of any claim of Mexico or any other country or any Indian tribe to any territory or other property of the United States." *Id.*

211. *See id*; *see also* Richard Delgado & Daniel A. Farber, *Is American Law Inherently Racist?*, 15 T.M. COOLEY L. REV. 361 (1998).

212. *See* Walter L. Stiehm, *Poverty Law: Access to Healthcare and Barriers to the Poor*, 4 QUINNIPIAC HEALTH L.J. 279 at n.42 (2001) (discussing the relationship between the political status of Mexican Americans in the Southwest and their inability to get adequate healthcare); *see also* Kristi L. Bowman, Note, *The New Face of School Desegregation*, 50 DUKE L.J. 1751 (2001) (noting the correlation between poverty in the Southwest and the inadequacies in education suffered by Mexican Americans).

Thus, it is in the collective interest of the nation that this issue be publicly acknowledged. It is abundantly clear that redress through the American judicial system is no longer a truly viable option. Under existing federal law, even meritorious land grant claims are likely to fail. For example, even in instances where courts have acknowledged the validity of claims, statutes of limitations as well as other legal mechanisms have served to keep these legitimate claims from being fully litigated and decided. It is therefore more important that the nation take steps towards reconciliation with a formal declaration of responsibility to those who were illegally and immorally dispossessed of land that was rightfully theirs.

The complicated nature of the adjudication and legislation of Mexican and Spanish land grants makes it very likely that many who have been wronged by America's expansionist policies will never be compensated. A century and a half have passed with only the slightest admissions of culpability, and the likelihood of any real justice being done grows increasingly faint. A public admission of culpability, therefore, is the necessary first step in finding a viable method of compensation for those wronged by the actions of the federal legislature and courts. The Treaty of Guadalupe Hidalgo has not been honored in the 153 years of its existence, but its spirit can be rekindled with the simplest of confessions so that the process of reconciliation can begin in earnest.